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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al, Petitioners, vs. UTAH DIVISION OF OIL, GAS & MINING, Respondents, ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH, Respondent/Intervenors.	**RESPONDENT ALTON COAL DEVELOPMENT, LLC'S RESPONSE TO PETITIONERS' POST-HEARING BRIEF ADDRESSING AIR QUALITY AND CULTURAL/HISTORIC ISSUES** Docket No. 2009-019 Cause No. C/025/0005

Alton Coal Development, LLC ("**Alton**" or "**ACD**"), the permittee of Mine Permit No. C/025/0005 ("**Permit**"), through its attorneys, submits this response to the closing brief addressing air quality and cultural/historic issues submitted by petitioners Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, Natural Resources Defense Council and National Park Conservation Association (collectively "**Petitioners**").

A review of the arguments and elements of proof set forth by the Petitioners does little more than highlight their failure to meet their evidentiary burdens. Petitioners were not able to demonstrate that ACD's mine permit failed to meet the conditions for approval set forth at R645-300-133 as to air quality or cultural resources. As a result, their claims on these issues fail and the Division's approval of ACD's mine permit on air quality and cultural resource issues should be affirmed.

ARGUMENT

A. Cultural Resources

1. Issue 1: Whether the Division's determination of eligibility and effect related to cultural resources covered the entire permit area for the Coal Hollow Mine.

The Petitioners argue that "the absence of a cultural resource inventory for part of the permit area rendered the permit application incomplete and the Division's approval of it unlawful." (Pet. Br. at 11.)

Petitioners have inaccurately cited to the record to support their claims. The evidence cited by Petitioners in support of this issue does not prove a violation of the rules for cultural resource protection. Contrary to Petitioners' claim, Pet. Br. at 11-12, Permit Supervisor Daron Haddock did not admit at the hearing that the permit application was incomplete; in fact, he denied it. His response cited by Petitioners in their Memorandum was unambiguously his answer to Petitioners' question about the November 2007 determination of eligibility and effect rather than the permit application. Petitioners' subsequent question at the hearing, which they did not cite for the Board, then inquired regarding the application's completeness. In reply, Mr. Haddock stated that he did not view the permit application to be incomplete and explained his reasons.

MS. BUCCINO: So the Division's determination of

23 eligibility and effect that was submitted to the SHPO on
24 November 2, 2007, was incomplete, then. Is that correct?
25 MR. HADDOCK: I guess you could say it that way.
1 MS. BUCCINO: Okay. Thank you.
2 And the permit application, as it was approved
3 on October 19, 2009, was also incomplete because it did
4 not have all the sites in the permit area. Is that
5 correct?
6 MR. HADDOCK: I would say no, that is not
7 correct. There are certainly provisions. Just because
8 cultural resources may not have been identified in the
9 original application doesn't necessarily invalidate the
10 application. I think there are provisions in the rules
11 that allow for previously unidentified resources to be
12 made known and to be addressed after permit issuance.

Hrg. Tr. 30:22–31:12 (Apr. 30, 2010).

Similarly, Petitioners are wrong in their assertion that the final Technical Analysis does not identify cultural resource inventories. Pet. Br. at 11. The Final TA identifies the initial Cultural Resource Inventory by the date it was first submitted to the Division, June 14, 2007. Final Technical Analysis at 18 (Ex. D-18) (referencing the Cultural Resource Inventory found in the confidential file at \Coal Hollow\Confidential\C0250005\2007\06142007\0001.pdf.) The second cultural resource inventory is fully discussed in the CRMP, which is listed in the final Technical Analysis. See Cultural Resource Management Plan Draft 2 (May 23, 2008) (Ex. D-16) (including a map of all sites at page 4, a description of previous work in the permit and adjacent areas at 16, and a list of all sites at 21–25). Petitioners' claims that cultural resource survey information is absent from the record, or uncited in the TA, are simply false, and cannot support a factual finding on this issue.

As set forth in great detail in Alton's closing memorandum, the Petitioners' argument that the Division overlooked significant cultural and historic resources within the permit area is refuted by the evidence set forth in the hearing. (See Alt. Cl. Memo. at 3-5.) The two sites

inadvertently left out have been evaluated by the Division for eligibility and effect and have received concurrence by SHPO. Preparation of a mitigation plan for these sites is pending. Letter from Dana Dean to Chris R. McCourt (Apr. 20, 2010) (Ex. D-20).[1] The Petitioners have cited no authority for the proposition that compliance with respect to these two sites cannot be addressed through imposing a condition on the Permit. Indeed, the rules regarding the findings for permit application approval anticipate just such a condition. R645-300-133.600. (The finding that the Division has taken into account the effect of the proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places . . . "may be supported in part by inclusion of appropriate permit conditions . . ."). The meager evidence offered by Petitioners proves no error with the Division's compliance with Utah's Historic Preservation statute and rules, and the permit, as conditioned, should be affirmed on this issue.[2]

2. **Issue 2: Whether the Division's determination of eligibility and effect related to cultural and historic resources covered any area outside the permit area approved for the Coal Hollow Mine.**

Petitioners argue that the Division failed to "identify an adjacent area" and to include a map "indicating the boundaries of an adjacent area evaluated for purposes of the cultural and historic resource review." (Pet. Brf. at 13). The rules require maps which show "the boundaries of any park and locations of any cultural or historic resources listed or eligible for listing in the

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[1] Realistically, Ms. Dean's letter was superfluous, because the permit for the Coal Hollow Mine articulates the same condition in Sec. 16: "If, during the course of mining operations, previously unidentified cultural resources are discovered, the permittee shall ensure that the site(s) is not disturbed and shall notify DOGM. DOGM, after coordination with OSMRE, shall inform the permittee of necessary actions required. The permittee shall implement the mitigation measures required by DOGM with in the time frame specified by DOGM." Draft Permit at 4 (Oct. 15, 2009) (Ex. D-3 at page 15 of 234).

[2] Even if the inadvertent omission of sites were a violation of the rules at the time the permit application was approved, remand to the Division at this time is a meaningless remedy. Every action the Division must take on remand prior to re-approval (determination of eligibility and effect, seek concurrence from SHPO, require mitigation measures) has already occurred, exactly as it would if the sites were discovered during mining operations. The proper action by the Board is to affirm the permit subject to the existing permit condition that the sites must be properly mitigated.

National Register of Historic Places and known archeological sites within the permit and adjacent areas." R645-301-411.141.1. As of October 19, 2009, when the Division made its permit findings, maps meeting these requirements were in the permit application. Cultural Resources Management Plan p. 4 fig. 2 ("**CRMP**"), (May 23, 2008) (Ex. D-16). The CRMP mapped and listed the location of each site located within the permit boundaries, those sites partly inside and partly outside the permit boundaries, and those sites wholly outside the permit area. CRMP, Table 2, pp. 21-25; Fig 2 Map. This CRMP is referenced in the Findings regarding cultural resources set forth in the Technical Analysis dated October 15, 2009. (Ex. D-8, p. 18). Notably, none of the sites listed in the CRMP and located wholly outside the permit area are within the "adjacent area" as defined by the Utah Coal Program.

The Petitioners fail to acknowledge this regulatory definition and understand that the adjacent area is not a geographical delineation identified by the permittee or the Division. Instead, the adjacent area is evaluated in terms of its context: "the area outside the permit area where a resource or resources, determined according to the context in which adjacent area is used, are or *reasonably could be expected to be adversely impacted by proposed coal mining and reclamation operations* . . . ." R641-100-200. Indeed, this definition indicates that the "adjacent area" is not readily subject to geographical delineation because it is defined by potential adverse impacts by the proposed operations on the resource at hand.[3] As confirmed in the CRMP, ACD

[3]When asked about a graphic delineation of the "adjacent area," Mr. Haddock testified:

> As far as a line on a map, there is none. And I don't think we wanted to limit ourselves to any specific geographical area. When we reviewed it, I think we looked at the cultural resource surveys that were done, we looked at the large -- a large geographical area. We were aware of where the permit boundary was. And we considered what impacts would occur as a result of the surface coal mining activities. And so as far as the geographical boundary, I don't think there is a particular line or something that was delineated. It was -- other than we did look at the permit boundary and realized that everything inside of the permit boundary was covered, and the area – the adjacent area to the permit area was also covered by the surveys. We determined that there would be no effect on those sites. And

properly inventoried known archaeological sites, including many that are wholly outside the permit area. However, because there is no evidence that these sites were likely to be adversely impacted by "coal mining and reclamation operations" by definition they fall outside the adjacent area, and therefore outside the rules regarding description, evaluation, or SHPO clearances.

To meet their burden of proof, the Petitioners were required to demonstrate the existence of at least one site outside of the Permit area that could be adversely impacted by coal mining and reclamation operations. They declined to do so. Without such a demonstration of impact, a site would clearly not be found within the "adjacent area."[4] Since the Division properly evaluated all sites within the Permit area and because no sites were identified that would be impacted by operations outside the Permit area, the Division fully complied with this requirement.

Further, Petitioners misconstrue the testimony of Jody Patterson, principal investigator, Montgomery Archaeological Consultants ("**MOAC**"), suggesting that "they did not look beyond the permit area in evaluating and addressing the adverse effects that the proposed Coal Hollow Mine would have on cultural and historic resources." (Pet. Brf. at 13-14.) Mr. Patterson stated

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> so I think we satisfied the requirement for looking at effects, or impacts, to cultural resources within the permit area and adjacent areas.

Testimony of Daron Haddock, Hrg. Tr. 17:6-23 (April 30, 2010).

[4] All surface areas that will be disturbed by "coal mining and reclamation operations" must be included within the permit area. See R641-100-200 (Defining "permit area" to include "all disturbed areas."). Moreover, the Division's analysis revealed that, for the resource sites straddling the boundary of the Permit area, there would not be any effect absent surface disturbance—which would not take place on those sites. Mr. Haddock's testimony explained why the Division concluded that sites located entirely beyond the permit boundary were unlikely to be adversely impacted. Hrg. Tr. 200:17–201:16 (Apr. 29, 2010). He indicated that because surface disturbance is the only expected means of adverse impact, and because surface disturbance must be confined to the permit area, sites located some distance from the permit area will escape any likely effect of "coal mining and reclamation operations." Hrg. Tr. 202:4–14, 204:4–205:3 (Apr. 29, 2010). The same was true with any sites outside the permit area: the only potential effect would be from surface disturbance, which could not take place. Therefore, those sites could not be considered within the "adjacent area."

in his 30(b)(6) deposition that MOAC did not "make an evaluation of the effect" of the Coal Hollow Mine outside the permit area. Id. However, Mr. Patterson testified that MOAC inventoried areas outside the permit area in the proposed federal lease area:

> Of course, we conducted the inventories in the blue areas as well but, to my knowledge, we haven't really addressed any impacts to those sites yet because we don't know what those impacts are going to be, and even if they are going to have those leases yet, although they have been inventoried.

Rule 30(b)(6) Deposition of Alton Coal Development, Testimony of Jody Patterson (Feb. 25, 2019) 18:23–19:3. Mr. Patterson also testified that analysis of the effects of the mine were conducted on sites located on the boundary of the permit area. Id. at 19:7–15. Even so, Petitioners' questioning of MOAC was misleading because a determination of eligibility and effect is to be made, according to Utah law, by the Division, not MOAC. Utah Code § 9-8-404; R645-301-411.142. Letter from Matthew Seddon to Pam Grubaugh-Littig (Nov. 20, 2007) (Ex. D-13); E-mail from Joe Helfrich to OGMCOAL (Jul. 15, 2008) (Ex. D-15); Letter from Lori Hunsaker to Daron Haddock (Apr. 26, 2010) (Ex. D-22). Mr. Patterson clarified at Hearing that the Division's determination of eligibility and effect may be based on MOAC's recommendations.

> MS. BUCCINO: Okay. But I just want to pin down what is in an inventory and what's not in an inventory.
> MR. PATTERSON: In the inventory reports that we submitted relative to the permit area, we have several sections of those reports. There's an introduction, there's a brief description of the natural environment. There's a brief description of the cultural history of the region. There is a section detailing the methods that we use when we conducted the survey. There is a section that describes the results of our inventory. There is another section that gives our recommendations for the eligibility of those sites as it relates to the National Historic Preservation Act. And there is typically a section that gives our recommendations regarding those sites and whether they will be impacted,

24 or possibly if they need to be mitigated or whether there
25 is no effect.

Hrg. Tr. 103:11-25 (Apr. 30, 2010).

Finally, the Petitioners argue that there was no valid SHPO concurrence related to an adjacent area outside the permit area for the current permit. The substance of this new claim appears to be that because the Division's initial concurrence letter was prepared in the context of the original application that was determined administratively incomplete in August 2007, it expired. This argument lacks any factual support, and is baseless in law or logic. The Petitioners do not cite to any authority for the proposition that a SHPO concurrence expires in the event an application is deemed administratively incomplete.

Even if the Board were to accept such a proposition, the Petitioners' allegations that the request and concurrence received was based only on a version of the permit that was denied, and that "nothing in the record indicates that a subsequent concurrence was requested or given" are misleading at best.[5] (Pet. Br. at 15.) To the contrary, approximately two pages of transcript testimony follow the citation provided by the Petitioners, in which Mr. Haddock explained that SHPO had indeed concurred again (despite the lack of any requirement to do so). (Testimony of Daron Haddock, Hrg. Tr. 26: 3-28:14 (April 30, 2010).)

Petitioners utterly fail to identify any cultural resource escaping Division evaluation or SHPO concurrence that meets the regulatory definition of "adjacent area." Petitioners' argument

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[5] Mr. Haddock testified as follows:

3 MS. BUCCINO: Okay. Are you testifying that the
4 Division didn't seek concurrence on the permit it
5 actually approved?
6 MR. HADDOCK: No, I'm not testifying to that at
7 all. All I'm saying is this request for concurrence was
8 on the submittal that was later denied. And then the
9 applicant made a subsequent submittal, and the Division
10 also requested concurrence later on.

that a lack of any SHPO concurrence on any site wholly beyond the permit area proves lack of adjacent-area analysis is an artifice that cannot substitute for proof on this issue. The permit decision should be affirmed on this issue for Petitioners' failure of proof.

3. **Issue 3: Whether the Division considered a mitigation plan for any cultural or historic resource located wholly outside the permit area.**

The Petitioners did not address this issue in their closing memorandum and have clearly conceded that the evidence and applicable law demonstrate that they cannot prevail. The permit should be affirmed on this issue.

4. **Issue 4: Whether the Division was required to identify and address the effect of the proposed Coal Hollow Mine on the Panguitch National Historic District ("PNHD") before approving the mine permit.**

The evidence presented at trial was clearly insufficient to demonstrate that the PNHD could reasonably be expected to be adversely impacted by anything meeting the regulatory definition of "coal mining and reclamation operations." The Petitioners, presumably recognizing that they cannot plausibly argue that the PNHD is impacted as a result of "coal mining and reclamation operations" seek to "lower the bar" as to what must be considered part of the "adjacent area." The Petitioners argue that any activity indirectly connected to defined coal mining and reclamation operations places the locus of that activity within the definition of affected area. The Petitioners rely (tenuously) on definitions found in federal regulations promulgated pursuant to the National Historic Preservation Act ("**NHPA**") in support of this proposition. These federal mandates are not applicable to the Utah Coal Program or State undertakings pursuant to Utah Code § 9-8-404(1).

The substance of the Petitioners' argument is that the Division "must interpret the term 'adjacent area' in a way that is consistent with both federal and state law." Specifically, they

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Testimony of Daron Haddock, Hrg. Tr. 26:3-10 (April 30, 2010).

claim that "adjacent area" should be interpreted using the definition of "area of potential effects" as set forth in the federal NHPA Section 106 consultation regulations, which includes areas where "an undertaking may directly or indirectly cause alterations in the character or use of historic properties." 36 C.F.R. § 800.16.[6] The Petitioners' argument fails as a matter of law. Indeed, the Petitioners either misunderstand, or fail to identify, the applicable law, instead relying on case law that is outdated, irrelevant[7] or even expressly overruled.[8]

The primary difficulty with the Petitioners' argument is that it is founded upon an incorrect and outdated definition of "undertakings." The Court of Appeals for the D.C. Circuit held in National Min. Ass'n v. Fowler that for purposes of Section 106 consultation, 16 U.S.C. § 470w(7) does not apply to "undertakings" that are subject to state or local regulation administered pursuant to a delegation or approval by a federal agency. 324 F.3d 752 (D.C. Cir. 2003). In response to Fowler, the applicable definition of undertaking was amended in 2004 to omit "undertakings that are merely subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." See 69 Fed. Reg. 40544-01, 40546 (July 6, 2004).

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[6] Petitioners' attempt to distinguish Harman Mining Corp. v. Office of Surface Min. Reclamation and Enforcement, 659 F. Supp. 806 (W.D. Va. 1987), because it dealt with the "affected area," not the "adjacent area." Petitioners' attempt to distinguish Harman in this manner fails. Quite simply, Harman does not address the difference between these two terms and instead focuses on defining whether transporting coal constitutes coal mining and reclamation "operations."

[7] For instance, Petitioners' reliance upon Wilson v. Block for support of its contention that federal case law establishes that "effects" can "include impacts related to transportation over routes extending significant distances from the site of extraction" is misplaced. 708 F.2d 735, 754 (D.C. Cir. 1983). Wilson did not deal with a coal mining permit, or even with defining the "adjacent area." Although the road at issue was stipulated by the parties to be part of the "area of potential environmental impact" (a term which, as shown above, is completely inapplicable to the State of Utah's definition of "adjacent area"), that road was the only road in and out of the permit area, and only extended for roughly seven miles. This stands in stark contrast to US Highway 89, which is not part of the permit area, nor even an exclusive access road to the permit area.

[8] Petitioners' citation to Indiana Coal Council, Inc. v. Lujan, 774 F. Supp. 1385, 1403 (D.C. Dist. 1991) should be disregarded because the relevant portion of that case was vacated by the Court of Appeals for the D.C. Circuit. Indiana Coal Council, Inc. v. Babbitt, 1993 WL 184022 (D.C. Cir. 1993).

The current applicable definition of undertaking for § 106 consultation is: "Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval." 36 C.F.R. § 800.16 (emphasis supplied). Thus, Petitioners' authority is clearly outdated, and the Coal Hollow Mine Permit, issued by a state agency regarding private coal lands, is not encompassed by this definition applying to Federal agencies and Federal permits.[9]

Were the Board to overlook the Petitioners' outdated and irrelevant case law in accepting their proffered standard for "adjacent area," the Petitioners still cannot escape the fact that they have not adduced any real evidence that the operations under the Permit would even indirectly alter the PNHD's "character or use." The only "evidence" on this claim provided by the Petitioners are speculative statements of concern offered by citizens and Federal land managers during the comment period.

Even if these statements of concern had independent evidentiary value, as a matter of law they cannot stand alone to support a factual finding by the Board on this issue. As proof of any impact to PNHD, these comments are hearsay, because they are out-of-court statements offered to prove the truth of the matter asserted. Utah R. Evid. 802. Here, they were offered to prove that the traffic and vibration on US Highway 89 would have an adverse impact on the PNHD. While it is true that the Rules of Evidence do not strictly apply to Board hearings[10] and "hearsay

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[9] This understanding is further supported by the plain language of SMCRA's congressional findings, which states that, "the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest with the States." 30 U.S.C.A. § 1201

[10] See R641-108-200 ("The Board shall use as appropriate guides the Utah Rules of Evidence insofar as the same may be applicable and not inconsistent with these rules.")

evidence is clearly admissible in administrative hearings . . . [i]t is also true, however, that under the residuum rule, findings of fact must be supported by a residuum of legal evidence competent in a court of law." Prosper, Inc. v. Department of Workforce Services, 2007 UT App 281,¶ 11, 168 P.3d 344 (internal citations and quotations omitted). Thus, the Petitioners' exclusive reliance for proof upon speculative hearsay statements (that would be inadmissible in a court of law) is insufficient. The claim regarding the PNHD must fail because petitioners have not proved the existence of any "coal mining and reclamation operations" affecting PNHD, nor the existence of any reasonably expected impact arising from those operations. The mine permit should be affirmed on this issue.

5. **Issue 5: Whether the Division determined that the Fugitive Dust Control Plan for the Coal Hollow Mine met the requirements of the Division's regulations prior to approving the mine permit.**

The Petitioners argue that the Division improperly approved the mine permit without first having determined that Alton's Fugitive Dust Control Plan met the Utah Coal Program regulations. Stated another way, the Petitioners' argument is that the Division was not allowed to approve the mine permit subject to the condition that Alton obtain an Air Quality Approval Order from the Utah Division of Air Quality ("**DAQ**").

Petitioners do not cite any authority for the proposition that the Division cannot approve the mine permit subject to such a condition. To the contrary, there are numerous specific instances throughout the Utah Coal Program where requirements can be assured after permit approval by imposing conditions on applicant's mining operations or practices. See e.g. R645-300-133.600; R645-300-143; R645-303-222; R645-223.300.

The only proof offered by Petitioners on this point is that the Division chose to condition the mine permit on approval of an Air Quality Order from DAQ because it believed DAQ better situated than DOGM to evaluate the technical merits of Method 9, Alton's preferred method for

monitoring emissions of fugitive dust. Petitioners offered no evidence on the efficacy of Method 9, nor did they offer any evidence regarding the efficacy of the dust control measures set forth in the Fugitive Dust Control Plan.

The relevant legal standard requires that the dust monitoring plan must produce data sufficient to evaluate the effectiveness of the planned dust control measures when they are employed. R645-301-423.100. The rule specifies no particular means that the Division must use to assure itself, in advance, of data sufficiency, and Petitioners present neither evidence nor argument explaining any reason why deference to the DAQ on this point is not a perfectly reasonable means of assuring the sufficiency of fugitive dust monitoring data. At the Hearing, Ms. Burton explained that she chose this approach after learning that the Wyoming coal program, much more experienced in regulating surface coal mining than the Utah program, defers its decisions on monitoring and enforcement to its sister air quality agency. Hrg. Tr. 101:2–102:7 (Apr. 29, 2010). Further, the Division and the Utah Department of Environmental Quality have entered into a cooperative agreement providing that the agencies will coordinate the review and enforcement of environmental permits. Memorandum of Understanding dated September 1, 1999 (Ex. D-4). Because Petitioners have not proved that the monitoring plan is inadequate under the relevant standard or that the Division acted unreasonably in relying on DAQ and conditioning the mine permit accordingly, the claim must fail and the permit should be affirmed on this issue.

6. **Issue 6: Whether the Division of Air Quality provided the Division of Oil, Gas and Mining [with] an evaluation of the effectiveness of the Fugitive Dust Control Plan for the Coal Hollow Mine prior to the Division's approval of the mine permit.**

SEE RESPONSE TO ISSUE 5, above.

7. **Issue 7: Whether the Division of Air Quality has provided notice to the Division of Oil, Gas and Mining of receipt of a complete air permit application from ACD for the Coal Hollow Mine.**

The Petitioners did not address this issue in their closing brief and have clearly conceded that the evidence and applicable law demonstrate that they cannot prevail. The permit should be affirmed on this issue.

8. **Issue 8: Whether the Division of Air Quality has provided notice to the Division of Oil, Gas and Mining of approval of an air permit for the Coal Hollow Mine.**

The Petitioners did not address this issue in their closing brief and have clearly conceded that the evidence and applicable law demonstrate that they cannot prevail. The permit should be affirmed on this issue.

9. **Issue 9: Whether the Division was required to wait for the Division of Air Quality's evaluation of the Fugitive Dust Control Plan including the plan's effectiveness in addressing the quality of the night skies before approving the Coal Hollow Mine Permit.**

The Petitioners object to the Board's finding that "the controlling regulations create no requirement to consider the impact of fugitive dust on night sky clarity" and ask the Board to reconsider. (Pet. Brf. at 7 (citing Order Concerning Motions to Dismiss 3-4, (Feb. 18, 2010).) The Petitioners' argument is that the Division must "ensure that any coal mine permit it approves includes a fugitive dust control plan that 'effectively control[s] . . . air pollution attendant to erosion.'" (Pet. Brf. at 9.) Essentially, Petitioners' repackaged argument is that night sky quality is an air pollution issue, and thus falls within the purview of R645-301-244.100. The argument was unsupported by any proof from Petitioners that the sky at any location outside the permit area would be impacted by the mine's operations under its dust control plan.

Petitioners' ploy to revive their night sky claim in the form of an argument regarding the effect of fugitive dust resulting from soil erosion on the night sky backfires. Because it is the dust control plan, and not the monitoring plan, that provides for control of emissions that might affect sky clarity at any time of day, Petitioners cannot prevail on this issue without showing that the dust control methods were inadequate. No such evidence was offered. The entirety of the evidence presented at Hearing on this subject was that the mine permit includes a fugitive dust control plan that was reviewed by a qualified soil scientist who determined it would be effective in meeting the regulatory requirements related to soil erosion. Final Technical Analysis 86–87 (Oct. 19, 2009) (Ex. D-8).

> MR. DONALDSON: Thank you. And did you -- when the Fugitive Dust Control Plan was submitted to the Division, did you review that plan?
> MS. BURTON: Yes, I did.
> MR. DONALDSON: And did you find it to sufficiently describe fugitive dust control practices?
> MS. BURTON: Yes, I did. I reviewed it with regard to the rules, which were cited in R645-301-423.200, the rules it is designed to comply with. And those are the R645-301-244.100, sediment control and erosion control from the site. So I reviewed it.

Testimony of Priscilla Burton, Hrg. Tr. 99:18–100:2 (Apr. 29, 2010).

In place of evidence regarding the dust control plan, the Petitioners' only evidence in support of its contention that there could be a "potential impact" to the clarity of night sky are statements of concern from two federal land managers and one subdivision developer. Pet. Br. at 7–8. As discussed above, this is hearsay testimony that cannot stand alone to support a finding of fact regarding potential impacts of fugitive dust.[11] Even if this evidence were useful to the Board, it fails to provide proof of any reason why the dust control methods evaluated by the

[11] Supra at 11.

Division do not fully address the concerns raised. Petitioners' issue regarding the night sky, if it even remains alive following the Board's February Order dismissing the claim, necessarily fails for lack of proof. The mine permit should be affirmed on this issue.

CONCLUSION

After demanding, and receiving, an evidentiary hearing supported by extensive discovery of both Alton and the Division, and consuming five months preparing their case, Petitioners offer a paltry amount of proof to meet their burden. On every issue, the overwhelming weight of evidence offered at Hearing shows that the relevant legal standards for permit approval were met.[12] Petitioners have failed to meet their burden of proving that any relevant legal standard was violated by the Division's approval of the Coal Hollow Mine Permit. Alton respectfully requests that the Board dismiss Petitioners' allegations and affirm the Division's decision to approve the permit for the Coal Hollow Mine as to air quality and cultural resource issues.

SUBMITTED this 19th day of May, 2010.

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[12] Alton further notes that all of the legal arguments and record evidence offered by Petitioners were available to them on the day the permit was issued six months ago, and could readily have been presented to the Board within the 30-day time frame contemplated in the statute.

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of May, 2010, I e-mailed a true and correct pdf copy of the foregoing **RESPONDENT ALTON COAL DEVELOPMENT, LLC'S RESPONSE TO PETITIONERS' POST-HEARING BRIEF ADDRESSING AIR QUALITY AND CULTURAL/HISTORIC ISSUES** to the following:

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